STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	)))	ICC Docket No. 15-0512
Amendment of 83Ill. Adm. Code 412 and 83Ill. Adm. Code 453	))	

VERIFIED SURREPLY COMMENTS OF THE PEOPLE OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
By Lisa Madigan, Attorney General

Janice Dale
Chief, Public Utilities Bureau
Ronald D. Jolly
Assistant Attorney General
Public Utilities Bureau
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-7203 (Jolly)
Email: rjolly@atg.state.il.us

December 3, 2015

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	)	
	)	ICC Docket No. 15-0512
Amendment of 83 Ill. Adm. Code Part 412 and 83 Ill. Adm. Code Part 453	)	

VERIFIED SURREPLY COMMENTS OF
THE PEOPLE OF THE STATE OF ILLINOIS

Pursuant to the schedule established by the Administrative Law Judge at the September 28, 2015 status hearing, the People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois ("AG" or "the People"), hereby file their Verified Surreply Comments in the above-captioned matter.[1] The AG's Verified Surreply Comments respond to the Reply Comments filed by the Illinois Competitive Energy Association ("ICEA"), the Retail Energy Suppliers Association ("RESA"), Prairie Point Energy, LLC. d/b/a Nicor Advanced Energy LLC ("Nicor" or "NAE"), the Environmental Law and Policy Center ("ELPC"), the Illinois Commerce Commission Staff ("Staff"), Ethical Electric, Inc. ("EE"), Commonwealth Edison Company ("ComEd"), and the Citizens Utility Board ("CUB").

I. The Proposed Revisions to Part 412 Are Necessary.

CUB's Reply Comments provide an excellent overview of the two very disparate views of this proceeding taken by Staff, the AG, and CUB on one hand and the retail electric suppliers ("RES" or, in the plural, "RESs") on the other. As CUB states, RESs downplay the problems that exist in the RES market; insisting that any problems in the market are minimal at best and, to the extent problems exist, the ICC should use current laws and regulations to punish bad actors. Staff, the AG, and CUB, however, present substantial evidence that the problems in the retail

[1] The AG's revised mark-up of Staff's Draft Rule is attached as Appendix A.

electric market are far more pervasive than the RESs portray.[2] *See, e.g.*, CUB Reply Comments at 1-3.

It is clear that the vast majority of Illinois residents do not understand the complexities of the electric retail market. While retail competition may seem relatively straightforward to the participants in this proceeding, it is fair to say that to that most people are either completely unaware that they can choose an alternative electric supplier or, to the extent they are aware, they do not have the time or energy to fully inform themselves of what their best options are. Moreover, it was only recently that residential customers could exercise the option of choosing an alternative provider. For many decades, Illinois residents simply paid their electric bill to their electric company. There was no need to know or to understand the difference between a monopoly delivery services company and competitive electric supply. The recent advent of competitive supply changed the decades-old arrangement and introduced potential confusion into Illinois residents' electric service.

As CUB explains, whether intentional or not, RESs have taken advantage of that confusion. In particular, CUB states

> CUB has observed that not only is the residential customer base inexperienced and the sales channel inherently problematic for many reasons, but sales agents have often proven to be inept at providing the information necessary for the consumer to make an informed decision, a problem that spans all RES, not just so-called bad actors. The problem is pervasive enough that the existing regulatory scheme does not adequately address it.

Id. at 2. In other words, it is not only so-called "bad actors" that pose problems in the retail electric market, but an inexperienced and uninformed customer base that have caused individual retail customers to make decisions that are not in their economic best interests.

[2] ComEd agrees that that Staff, the AG, and CUB have presented clear evidence that additional rules are warranted. ComEd Reply Comments at 2-4.

Most of the proposed changes in Staff's Draft Rule are designed to bridge that information gap and, as CUB explains

> [provide] additional disclosures and recordings [that] create the data and records to ensure – and enforce – uniform performance from all RES. Consistent disclosures regarding the RES product, reasonable boundaries on the sales and enrollment process, and records of the sale protect the RES and customers and provide transparency for all parties.

Id.

For its part, ICEA seems to agree that additional information would be helpful. ICEA starts its Reply Comments by stating

> At its essence, this docket is about preventing RES (and RES agents) from deceiving or misleading mass market customers through marketing, solicitation or contracting practices. ICEA believes strongly in these goals and imagines that every reputable stakeholder would agree. The bedrock of a well-functioning competitive market is consumers having access to relevant, nondeceptive information so that market participants can compete for business based on their ability to match products with consumer price and feature preferences.

ICEA Reply Comments at 2.

However, while professing its strong belief in transparency and informed customers, ICEA argues that existing laws and regulations are sufficient to address the "bad" acts of errant RESs and their agents.[3] To support its claim, ICEA cites an example from CUB's Initial Comments in which CUB described a hypothetical situation that Staff's Draft Rule could address. ICEA Reply Comments at 3, *quoting* CUB Initial Comments at 7. CUB's example is reproduced below.

> For example, if a RES agent enters a publicly subsidized housing complex through nefarious means, and promises consumer's [sic] savings, but the offered rate is significantly above the utility price-

[3] Nicor, EE, and RESA make similar arguments in their respective Reply Comments. Nicor Reply Comments at 1-2; EE Reply Comments at 2-3; RESA Reply Comments at 2, 8-11.

> to-compare (say, $.14 a kWh, an offer CUB has seen), the customer could then file a complaint to the Commission and the Commission could then request that RES produce written proof of marketing permission from building owner. Adding such a sentence around written permission or consent of building owner would give ICC the "hook" it needs to enforce such a rule.

According to ICEA, existing laws and regulations are sufficient to address the problems described in CUB's example and additional rules are not necessary to address the situation. ICEA Reply Comments at 3-4.

However, as CUB describes in its hypothetical, Commission enforcement would be far easier under Staff's Draft Rule. The Commission would not necessarily have to wait for a person to come forward to file a complaint and possibly have to go through a lengthy formal complaint process to conclude that the RES violated specific laws or regulations. Rather, after a complaint, the Commission could simply require the RES to produce written permission that it was authorized to market in the building in question. Such straightforward evidence would permit the Commission to quickly determine whether the RES acted outside the ICC's regulations.

In sum, there is ample evidence that Staff's Draft Rule, as well as the AG's modifications to Staff's proposal, are needed. The suggested modifications will provide customers additional data to make more informed choices about their electricity needs. The proposals will also provide additional data and records that will allow for more streamlined and more consistent enforcement of the Commission's rules.

II. The Commission Has Authority Adopt Staff's And The AG's Proposed Modifications To Part 412.

ICEA and RESA argue that the Commission does not have authority to adopt the modifications to Part 412. ICEA Reply Comments at 2, 7-14; RESA Reply Comments at 5-8.

The AG refuted these arguments in its Reply Comments and will not repeat them in full here. However, it is worth noting that, despite participating in the Commission case on appeal, neither ICEA nor RESA address the Illinois Appellate Court's recent decision in *Ameren Illinois Company v. Ill. Comm. Comm'n, et. al.*, Nos. 4–14–0173, 4–14–0182, 2015 IL App. (4th Dist.) WL 140173 ("*Ameren*"). In that case, the court found that the Commission had authority to implement certain consumer protections regarding alternative retail gas suppliers ("ARGS").[4] Similar to the arguments made by ICEA and RESA in this case (ICEA Reply Comments at 11-12; RESA Reply Comments at 6-7), the ARGS claimed that three consumer protection provisions the Commission required be included in in Ameren's small volume transportation tariffs were beyond its statutory authority because they were not explicitly found in Article XIX of the Public Utilities Act (the "Act"). *See, e.g., Ameren* at ¶¶ 2, 87, 105.

The AG will not repeat its entire analysis of the *Ameren* decision here, but, suffice to say, the court rejected the ARGS's arguments, finding that the Commission's authority to adopt consumer protections is not limited to what is explicitly included in the Act. In its penultimate paragraph, the *Ameren* court stated

> The suppliers cite no case holding that the Commission must be purely reactive, and never proactive, in the practices, rules, and regulations it requires in tariffs. They cite no case holding that consumers must be exploited in sufficient numbers before measures can be taken to protect them. To borrow an analogy from the Commission's brief, the Commission should not have to wait until someone is run over by a train before it declares a railroad crossing to be dangerous.

Id. at ¶ 134. Staff's – and the AG's – recommended changes to Part 412 are consistent with the *Ameren* court's decision in that they provide additional consumer protections to remedy what has been shown to be problems in the retail electric market.

[4] Alternative retail gas suppliers are the natural gas equivalents of RESs.

It is also worth pointing out that before becoming effective, existing Part 412 passed through the legislative process, including being reviewed by the General Assembly's Joint Committee on Administrative Rules ("JCAR"). JCAR voiced no objection to the then-proposed Part 412. Because JCAR sanctioned existing Part 412, it is fair to assume that the General Assembly concluded that the Commission has the authority to adopt rules regarding RESs.

III. Ethical Electric Provides Misleading Data To Support its Claim That There Has Been A Paucity Of Consumer Complaints Regarding RES Practices.

Ethical Electric claims that there is little evidence warranting modifying Part 412. In support of its claim, EE submits data that supposedly show that additional rules are not necessary. Specifically, EE states that in 2012, 2013, and 2014, very small percentages of "switched customers" complained about RES service. EE Reply Comments at 2-3. EE's statistics are misleading.

As Staff explained in its Initial Comments, the vast majority of "switched customers" in 2012, 2013, and 2014 took RES service as part of a municipal aggregation program. Staff Initial Comments at 1 ("approximately three-quarters of residential customers served by RESs received service through a government aggregation program (approximately 78% as of May 2013 and approximately 74% as of May 2014"). Staff added that a very small percentage of complaints it received from 2012 through September 2015 were from customers taking RES service as part of a municipal aggregation program. *Id*. at 1-2.

An obvious conclusion to be taken from Staff's analysis is that one must account for the distorting impact of municipal aggregation when analyzing complaints about RES service from 2012 through September, 2015. The tremendous percentage of RES customers taking RES service through municipal aggregation should make one wary of drawing any conclusions regarding the success of – or problems with – the RES market.

Despite Staff's straightforward explanation, EE rushes in to assert that because there are so few complaints about the RES market, Staff's proposed rules (and one assumes additional rules proposed by the AG and others) are overkill. EE Reply Comments at 2-3. EE's citation to the number of customers who have switched to RES service is grossly inflated because it includes customers taking service as part of municipal aggregation programs and its reliance on this number is specious. The Commission should be wary of parties that submit misleading statistics to support their arguments.

IV. Responses To Arguments Made Regarding Staff's And The AG's Proposed Changes To Part 412.

In this section of the People's Surreply comments, the AG responds to arguments made regarding Staff's and the AG's respective recommended modifications to Part 412. This discussion is not intended to be exhaustive. Failure to respond to any argument submitted by any party should not be considered an endorsement of that argument**.**

Section 412.10 - Definitions

Staff and ICEA argue that the AG's proposed definition of "renewable energy crdist" or "RECs" is not necessary. Staff Reply Comments at 8; ICEA Reply Comments at 15. ICEA goes on to say that if the Commission disagrees with its position, it should use the definition of "renewable energy credit" in the Illinois Power Agency Act. 20 ILCS 3855/1-10. The AG believes that a definition of "RECs" is necessary because electricity suppliers marketing renewable", "green", or "environmentally-friendly" products support their claims through the purchase of RECs. The AG does not dispute that RESs can sell "green" products by purchasing RECs, but it is clear that customers do not understand that RESs selling products sourced from renewable resources are purchasing RECs. Rather, customers do not understand the nature of the

product they are purchasing and believe that they are actually receiving electricity from wind farms or other renewable resources.

For example, Ethical Electric's marketing materials imply that customers do not understand the nature of the product they are purchasing. One of the questions in the "Frequently Asked Questions" ("FAQs") section of a recent EE solicitation[5] is "Will I need new appliances [if I purchase renewable energy]?" Appendix B at 6. The seemingly obvious implication of this question is that EE's experience is that customers believe that renewable energy is a different type of electricity requiring that they purchase new appliances. The fact that EE finds it necessary to include such a fundamental question in its FAQs shows that customers do not understand what they are purchasing.

Including a definition of RECs (as well the AG's proposed changes to Section 412.190) is designed to inform customers of what it actually means to purchase renewable energy. While the AG prefers its definition of "RECs", it is not opposed to the Commission adopting ICEA's recommended definition.

Staff includes a new definition of "transferred call" in its Reply Comments. Staff Reply Comments at 9-10. The AG accepts Staff's proposed new definition. As a result, the AG agrees to delete its proposed new section entitled "**Section 412.XXX Acceptance of Transferred Utility Calls Prohibited."** This change to the AG's recommended modifications to Staff's Draft Rule is included in Appendix A.

Section 412.115 - Uniform Disclosure Statement – Staff, ICEA, Nicor, and RESA oppose the AG's suggested change to the Uniform Disclosure Statement ("UDS") requirement of Section 412.115. Staff Reply Comments at 27-28; ICEA Comments at 19; Nicor Reply Comments at 4; RESA Reply Comments at 15. The AG recommends that RESs marketing

[5] The solicitation is attached as Appendix B.

variable-rate products be required to include a 12-month price history of the rates that were previously charged pursuant to the product.

Staff argues that the AG's recommendation is not consistent with its desire that the UDS be limited to one page. Staff also says that it recommends that the information the AG asks be included in the UDS be available on the Commission's PluginIllinois website. Staff Reply Comments at 27-28. The AG is sensitive to Staff's concern regarding limiting the UDS to one page. As a compromise, the AG proposes that there be a note included with the variable rate information in the UDS directing would-be customers to a second, separate page that would set forth the historical 12-month variable rate information. As to the availability of the 12-month variable rate information on the Commission's PluginIllinois website, the AG believes that it is important that customers have easy access to the 12-month historical information as they are considering a RES variable-rate offer. Moreover, Staff's argument ignores the fact that not all people have easy access to the internet.

ICEA and Nicor argue that the AG's proposal would not provide customers valuable or useful information. ICEA Reply Comments at 19; Nicor Reply Comments at 4. While a 12-month history of variable rates may not be perfect, that does not mean that a customer on a variable rate or a person considering a variable rate cannot glean valuable information from such data. As Staff notes in its Initial Comments, such information would provide customers "a high-level comparison of the various variable rates charged by competing RESs." Staff Initial Comments at 39. Staff also states that a similar requirement has been imposed in Pennsylvania and Maine. *Id*. at 41. In addition to those states, Texas requires that

> For a variable price product, the REP shall disclose on the REP's website and through a toll-free number the current price and, for residential customers, one year price history, or history for the life of the product, if it has been offered less than one year. A REP

> shall not rename a product in order to avoid disclosure of price history.

Tex. Admin. Code, Chapt. 25, SubChapt. R, §25.475(c)(2)(G).

Section 412.130 - Telemarketing – The AG recommended that RES telemarketing should be prohibited between the hours of 9:00 P.M. and 9:00 A.M., Central Standard Time. AG Initial Comments at 7. Both Staff and ICEA point out that the AG's proposal is inconsistent with the Telephone Solicitations Act. Staff Reply Comments at 50; ICEA Reply Comments at 24. In light of these comments, the AG agrees to withdraw this proposal. This change to the AG's recommended modifications to Staff's Draft Rule is included in Appendix A.

Section 412.140 – In-Bound Enrollment Calls – NAE opposes the AG's proposal to modify Staff's definition of "Inbound Enrollment Calls," which would add a phrase that would include in the definition calls made to change the provision of a customer's electric supply provider. NAE claims inbound enrollment calls should be limited to those in which a customer's power supply is switched from one provider to another. NAE Reply Comments at 2-3. NAE fails to consider those instances in which a customer is initiating service, attempting to move service from one location to another or trying to establish a different payment method or budgeting plan. Those calls are equally susceptible to sales pitches as are calls initiated for the express purpose of changing providers and should be the subject of similar consumer protections. NAE's arguments in this regard should be rejected.

Section 412.175 - Training of RES Agents – NAE's Reply Comments note that the AG's proposal to expand the requirements applicable to RES agent training includes a prohibition against making a record of a customer's account number unless the customer has agreed to enroll with a RES. NAE Reply Comments at 7-8. NAE points out that in certain situations, customer specific information may be needed in order to make a customized offer. *Id.*

The Commission has approved a process that would enable a RES to obtain customer consent for their utility to release individual account information. The People therefore modify their proposal to amend Section 412.175(d) as follows:

> d) No RES agent shall make a record of a customer's account number unless the customer has agreed to enroll with the RES or otherwise provided their consent to the release of that information in accordance with methods approved by the Commission.

This change to the AG's recommended addition to Staff's Draft Rule is included in Appendix A.

Section 412.190 – Renewable Energy Product Descriptions - The AG agrees that the availability and diversity of environmentally beneficial options to electricity consumers is a positive aspect of retail competition in Illinois. *See* EE Reply Comments at 1. However, as consumer interest in "green" or "clean" choices continues to expand, (*id*. at 2), it is critical that the Commission's rules: (1) help protect shoppers from potentially deceptive or misleading advertising; and (2) ensure that shoppers can easily evaluate the different options available to them. *Id*. at 17 (consumers must "not receive misleading advertising, but instead receive information about renewable energy that allow[s] them to make educated choices about purchasing renewable products). There is no doubt that Staff's proposed Section 412.190 is an improvement over the existing regulation. But there is more the Commission can and should require in order to facilitate a robust market for environmentally friendly options while ensuring consumer protection.

Various parties have suggested additional measures that should be added or substituted into Staff's proposed Section 412.190. *See, e.g.*, AG Initial Comments at 10-11; AG Reply Comments at 15-19; CUB Initial Comments at 12. Other parties have expressed concerns or objections to the proposals. *See* ICEA Reply Comments at 36-41; RESA Reply Comments at

16-17; EE Reply Comments. However, as demonstrated below and through various reply comments of parties, the concerns are easily addressable and need not and should not deter the Commission from enacting robust consumer protections for this category of RES offerings.

First, ICEA is concerned that RES may offer certain things (products, services, or offerings, depending on the terminology) that could accurately be called environmentally friendly but that do not involve the purchase of renewable energy certificates ("RECs"). ICEA Reply Comments at 37; ICEA Initial Comments at 39-40, 41. Cited examples include energy efficiency, demand response, distributed generation, energy audits, and carbon offsets. ICEA Reply Comments at 37. While the AG agrees with ICEA that RESs should be allowed to refer to these things as having "green, clean, or environmentally friendly attributes" if the RES can "back up those claims," (ICEA Reply Comments at 37), both the AG and ELPC have urged that the Commission's attention in this docket should focus on the supply aspect, *i.e.*, the actual electricity being sold to the customer. *See* AG Reply Comments at 16-17; ELPC Reply Comments at 6-7. As pointed out by ELPC, "RESs should be permitted to truthfully advertise the environmental benefits of [energy efficiency, smart thermostats, etc.]; they simply may not claim that the actual electricity itself is 'renewable,' 'green,' or 'environmentally friendly." *Id.* (emphasis added). A focus on the supply product dissipates ICEA's concern about the lack of RECs for other things that its members offer.

Second, Ethical Electric argues that it is appropriate to tell consumers that they can "buy" renewable energy or "power [their] home with renewable energy," even though—as the AG pointed out—the physics of the grid do not allow a supplier to represent exactly the source of a consumer's electrons. *See* EE Reply Comments at 15; AG Initial Comments at 11. EE states that the AG must "misunderstand" the basic functions of energy markets and the role of RECs,

such that the AG is making "proposals that do not reflect reality." EE Reply Comments at 14-16. Ethical Electric appears to be looking at marketing concerns from the completely wrong end of the spectrum (*i.e.*, from its own legalistic interpretations and not from the perspective of the consumer). Energy suppliers and energy professionals understand how RECs work and realize that purchasing renewable energy does not mean actually purchasing the electrons from a renewable generating facility. Average consumers, on the other hand, cannot be expected to be equipped with this knowledge and can and do misinterpret the very claims that Ethical Electric purports to be appropriate. Ethical Electric is incorrect about what it can appropriately tell consumers, and its lectures on energy markets and RECs are misplaced. RESs should not be permitted to tell consumers that consumers will be "buying" renewable energy or "powering their homes with renewable energy." Rather, RESs should be required to inform customers that the RES will be buying RECs and that RECs represent environmental attributes and not energy directly coming from a renewable generating facility. *See* AG Initial Comments at 11.

Third, ICEA cites the impracticality of disclosing the fuel type or location of RECs prior to customer enrollment. ICEA Reply Comments at 37; ICEA Initial Comments at 41-42. RESA similarly complains that Staff and the AG misunderstand how renewable products are created and structured, especially in terms of procurement of RECs on a rolling basis or set schedule instead of prior to customer acquisition. *See* RESA Reply Comments at 16-17. In response, multiple parties have discussed how impracticality or infeasibility objections can be addressed through a two-step process of (1) disclosing the anticipated or expected type and location of RECs along with that information from the previous year and (2) reporting to the customer the results at year's end of the type and location of RECs procured. *See* AG Reply Comments at 18; ELPC Reply Comments at 8; *see also* EE Reply Comments at 13. As Staff points out, if a RES

is already committed to a particular mix and location of renewable energy resources at the time they market particular offers, the RES must disclose that fact. Staff Reply Comments at 78. And, as ELPC explains, if a RES decided to make specific marketing claims up-front about the mix and location of RECs that it will procure for customers, the RES would be required to provide to the customer what it offered. ELPC Reply Comments at 8. In sum, the parties have identified workable solutions to provide customers with useful information while also accommodating ICEA's and RESA's concerns about the practicalities of REC procurement.

Section 412.210 - Rescission of Sales Contract – Nicor opposes the AG's recommended changes to Section 412.210. First, NAE opposes the AG's proposal that the enrollment notice from an electric utility be made by U.S. mail, stating there is no reason to require notice by mail when a customer has requested electronic notice. NAE Reply Comments at 8. The AG accepts that electronic notice is proper when the customer has made such a selection.

Nicor also objects to the AG's recommendation that a customer should be able to rescind a contract if the RES is unable to provide verifiable proof of authorization of enrollment. Nicor complains that "an inadvertently lost or destroyed verification record should not automatically result in a rescission." *Id*. at 9. Nicor's argument should be rejected. Customers should have the right to rescind a alleged contract if, through no fault of their own, a RES cannot produce the requisite authorization of enrollment.

Nicor and ICEA oppose the AG's proposal that "The written enrollment notice from the electric utility shall also provide information regarding options for the customer if the enrollment has been made in error or without the customer's consent, including contact information for the utility and for the Commission." *Id*.; ICEA Reply Comment at 41-42. It is not clear why NAE and ICEA oppose this suggestion. As explained in the AG's Initial Comments, the proposed

addition to Staff's Draft Rule is designed to provide customers whose service has been wrongly switched with valuable information about how to best handle what would likely be a confusing situation

Section 412.310 - Required RES Information – ICEA speculates that the AG's proposal that RESs be required to file its marketing materials once a year with the ICC is a ruse in which "… the AG wishes to gain access to all RES marketing materials through Section 4-601(b)(2) of the Public Utilities Act without the AG's Office making a formal request to RES." ICEA Reply Comments at 45. The AG is not certain of the source of ICEA's anxiety, but the People assure ICEA that was not its intention in making the proposed change. The purpose of the AG's recommendation is to ensure that the ICC is kept abreast of RESs' marketing efforts, not that it be provided a back door to such materials.

Section 412.320 - Dispute Resolution – Nicor opposes the AG's proposal that RESs be required to inform customers of their rights to file an informal complaint at the ICC if the customer is dissatisfied with the RES's handling of a complaint. NAE Reply Comments at 10. NAE states that RESs must provide customers such information as part of Section 412.110(c). *Id*. Section 412.110 describes the minimum terms and conditions that must be included in a contract. Customers may know where their RES contract is, they may not. The AG is not certain why Nicor is interested in possibly making it unnecessarily difficult for RES customers to pursue a complaint with the Commission if they are unhappy about a RES's efforts to resolve a dispute. Requiring RESs to provide such information is a minor imposition at best.

AG's Proposed Added Sections to Staff's Draft Rule - *Section 412.XXX Use of Utility Name or Logo Prohibited* - NAE asserts that the AG's citation of the *Illinois Power* case, *Illinois Power Co. v. Illinois Commerce Comm'n*, 316 Ill.App.3d 254 (5th Dist. 2000), does not

support the AG's argument that RES should be prohibited from using a utility name or logo in any RES material. NAE Reply Comments at 11-12. NAE cites the Court's holding that the ICC's ban on joint marketing and advertising for utilities and their affiliates was not more restrictive than necessary and therefore a constitutional regulation of commercial speech, due to the existence of Section 450.25(b), a Commission rule that "**allows affiliated ARES to use the utilities' corporate name and logo**." *Id.*, citing *Illinois Power* at 261 (emphasis added by NAE).

NAE's citation of section 450.25(b) of the Commission's rules is inapposite to the issue raised by the AG. The *Illinois Power* court relied on Section 450.25(b) only to explain that the ban on joint utility-affiliate advertising would not impinge on the commercial speech of utilities and their affiliates, in part because the Commission, in its discretion, had allowed other types of advertising to remain unrestricted.

> The ICC order still allows all utilities and ARES to advertise on their own behalf. It also allows affiliated ARES to use the utilities' corporate name and logo. 83 Ill. Adm.Code 450.25(b) (eff. November 7, 1998). The order simply prevents utilities and their affiliated ARES from joining marketing efforts and thereby misleading customers. Such confusion on the part of customers may disadvantage unaffiliated ARES that do not enjoy the benefit of joint marketing with the existing utilities.

Illinois Power at 261.

NAE's reliance on this reasoning is completely misplaced because the Court was not ruling on the validity of Section 450.25(b). It was merely pointing out that the rule at issue, Section 450.25(a) was part of a regulatory scheme to develop and enhance competition in the electric power market and that the validity of the ban on joint marketing needed to be evaluated as part of the complete regulatory scheme. As the Court noted the Commission's intention to prevent disadvantaging unaffiliated ARES and confusing or misleading customers, it also

acknowledged the ICC's "authority to oversee the restructuring of the Illinois electric marketplace and to insure a competitive retail market for the provision of electric service." *Illinois Power* at 262, citing 220 ILCS 5/16-101A(d). In reading the Customer Choice Act "as a whole," the Court cited the Act's endorsement of the Commission's active role in protecting consumers:

> The [ICC] should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all customers." 220 ILCS 5/16-101A(d) (West 1998). The Customer Choice Law also seeks to "promote fair and open competition in the provision of electric power and energy." 220 ILCS 5/16-118(a) (West 1998).

Id.

Nicor's citation of this decision does not support its opposition to the AG's proposal, because the Commission's role, as the Court recognized, also gives the agency discretion to revisit laws as circumstances warrant. *Illinois Power* at 261. States may regulate commercial speech that is deceptive or misleading, the Court reasoned, to ensure that commercial information "flows cleanly as well as freely." *Illinois Power* at 259. Should the Commission conclude that marketplace developments render an existing rule ineffective in protecting consumers or threaten the efficient or equitable operation of competition through the use of misleading or deceptive marketing practices, it may revisit and revise its rules accordingly to address that issue.

This leads to the crux of the issued raised by the AG: <u>allowing a RES to use a utility name or logo in marketing alternative services while at the same time forbidding the same RES from making representations of utility affiliation makes no sense</u>. The People disagree that their proposed prohibition would not serve a substantial government interest. At a minimum, it

would serve to reconcile the inherent conflict in this regulation.[6] Customer confusion about affiliation continues to be a problem in the alternative energy market such that the Commission's current rules, as well as Staff's proposed amendments, prohibit a RES from representing that it is acting on behalf of a utility. And as Staff correctly points out, the Commission is permitted to act in anticipation of possible unfairness, deception, or exploitation of consumers. Staff Reply Comments at 4, citing *Ameren* ¶ 135. Commonwealth Edison correctly cites the Commission's well-established authority to promulgate regulations governing ARES marketing, as evidenced by the previous adoption – and approval by the Joint Committee on Administrative Rules – of the existing Section 412. ComEd Reply Comments at 5. NAE's suggestion that the Commission lacks the authority to address a continuing problem in the RES marketplace by revisiting an existing rule is not credible.

The People are not alone in recognizing the inherent deception in permitting RES marketing to use a utility name or logo.[7] Significantly, Commonwealth Edison supports the AG's proposal to prohibit this practice, citing the *Illinois Power* court's discussion of the "likelihood of confusion or deception" for retail customers. *Id.* at 6, citing *Illinois Power* at 260. CUB endorses this change as well, pointing to its experiences with tens of thousands of customers and its ensuing conclusion that "significant customer confusion exists as to retail energy choice" as the basis for its support. CUB Reply Comments at 13.

NAE's arguments with regard to the AG's proposal to prohibit RES use of a utility name or logo in marketing RES services are without merit and should be rejected by the Commission.

---

[6] In accordance with its proposal, the People acknowledge that its adoption by the Commission would also require the repeal of Section 450.25(b).

[7] The use of any utility name or logo, not just that of the customer, is the focus of the prohibition. Customers living in one utility service territory are likely to be familiar with the utility's name and logo simply due to exposure through mass media.

Ethical Electric's comments include some legitimate observations about the enrollment process, pointing out that raising the utility's name is a starting point in that process, needed in order to define the customer's existing utility company, explain the different roles played by the RES and the delivery service company, etc. EE Reply Comments at 20-23. The People do not disagree that there are practical limitations to marketing alternative energy services without ever mentioning the name of the customer's utility. The People's goal is to minimize the possibility of deception or confusion on the part of the customer that the product being offered is somehow part of a regulated utility's operations. With those concerns in mind, the People propose this modification to its proposal on the use of a utility name and logo:

> No RES materials, including, but not limited to, direct mail or electronic marketing materials, shall display or utilize the name, logo, or any other identifying insignia, graphics or wording that has been used at any time to represent a public utility company or its services <u>to identify, label, describe, define or brand any of its alternative services or products</u>.

This change to the AG's recommended addition to Staff's Draft Rule is included in Appendix A.

V. Conclusion

Wherefore, the People of the State of Illinois respectfully request that Staff's Draft Rule be modified as set forth in the attached Appendix A.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By Lisa Madigan, Attorney General

By: ____/s/_____

Janice Dale
Chief, Public Utilities Bureau
Ronald D. Jolly
Assistant Attorney General
Public Utilities Bureau
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-7203 (Jolly)
Email: jdale@atg.state.il.us
rjolly@atg.state.il.us

December 3, 2015